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96-1949

Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term 1996

CLAUDE I. SMELSER,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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PETITIONER'S REPLY BRIEF

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*ROBERT LAUFMAN, ESQ.
MICHAEL A. KENNEDY, ESQ.
Attorney at Law
1409 Enquirer Building
617 Vine Street
Cincinnati, OH 45202
(513) 621-9100
Attorneys for Petitioner
**Counsel of Record*

LEGAL ADVANTAGE * *Advocates in Appellate Service*
432 Walnut Street * Suite 200 * Cincinnati, OH 45202 * (800) 581-2252

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REPLY BRIEF FOR THE PETITIONER

The Respondent, in its Brief In Opposition, first argues that the Petitioner failed to preserve arguments in regard to the standard of review and scope of Daubert in the court of appeals. It is important in this regard to understand that the Petitioner was the Appellee below. As the Appellee, the Petitioner dealt with eight separate issues presented for review by the Respondent, the Appellant below. Although the Respondent made a passing reference to the standard of review, none of the eight issues dealt with the standard of review. The Petitioner, as the Appellee below, answered the arguments advanced by the Respondent. In this posture, it is difficult to imagine how an Appellee could have any duty to "preserve an argument", not advanced by the Respondent as an issue presented for review. The primary case cited by the Respondent, Duignan v. United States (1927), 274 U.S. 195, illustrates the point. In the passage quoted by the Respondent at page 9 of its brief, the Court was referring to arguments

which the Appellant had failed to raise in the court of appeals in the "assignments of error" (Duignam, supra 200). The Petitioner, as the Appellee below, obviously advanced no assignments of error upon which a duty to preserve argument could be based. The Respondent stands the Duignan case on its head in an attempt to extract a duty on the part of the Petitioner to preserve argument. No such duty exists in law or in logic.

In any event, after the court of appeals issued its decision, making clear its reliance on Daubert under a de novo standard of review, the Petitioner vigorously argued the inapplicability of Daubert in his Petition for Rehearing.

The Respondent also argues, in spite of this Court's grant of certiorari in Joiner v. General Electric Company (1996), 78 F. 3d 524 (11th Cir.), cert. granted, 65 L.W. 3629, 117 S.Ct. 1243, 137 L.W. 2nd 325, that there is no conflict

among the circuit courts in regard to the standard of review under Daubert, "merely a difference in terminology used." The Respondent bases this assertion upon the fact that the Court in Joiner, supra stated that in regard to the interpretation of a Federal Rules of Evidence its review was plenary. First, it is clear that the court of appeals in this case went far beyond a mere interpretation of a rule of evidence and, in fact, dealt in detail with the fact underlying the expert opinion. Second, the Respondent completely ignores the statement by the Court in Joiner, supra, that "[a] district's court ruling on the admissibility of evidence is reviewed for abuse of discretion." To suggest that there is no real difference between an abuse-of-discretion standard and a de novo standard is to ignore completely the import of this Court's granting of certiori in the Joiner case.

The Respondent also argues that, if this Court should determine that Daubert applies only to novel scientific

evidence, the testimony of the Petitioner's expert was so baseless that it amounted to such novel scientific evidence. This argument can only be characterized as specious. As the decisions cited previously by the Petitioner make abundantly clear, the classification of testimony as that involving novel scientific evidence is based upon the nature of the scientific field involved, not upon the weight given to testimony of a particular witness.

The Respondent argues, finally, that even if the Court of Appeals employed the incorrect standard of review, the exclusion of expert testimony would still be appropriate. The case cited by the Respondent, Mastobuono v. Schearson Lehman Hutton, Inc., 115 S.Ct. 122 (1995), does not support the Respondent's argument. In that case, this Court dealt with a pure question of law, namely, the effect of a contractual provision on an arbitration award. In this context, it is understandable that this Court would state that the

"disposition would be the same under either a de novo or a deferential standard." Mastobuono v. Schearson Lehman Hutton, Inc., supra, 1215, footnote 1. In the case here, the court of appeals reversed the trial court on a ruling admitting evidence. The decision of the court of appeals deals in detail with the facts underlying Dr. Huston's testimony. The standard of review, whether deferential or de novo would clearly be critical to the decision in regard to the trial court's action.

SUMMARY

For the reasons stated above, and for the reasons stated previously in the Petition, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL A. KENNEDY
RODENBERG & KENNEDY
233 E. Main Street
Batavia, Ohio 45103
(513)732-2040
Attorney for Petitioner
Claude I. Smelser